

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT CINCINNATI**

ETHICON ENDO-SURGERY, INC.,)	
)	
Plaintiff,)	
)	
v.)	Case No. 07-1016
)	
CRESCENDO TECHNOLOGIES, LLC, an)	
Ohio limited liability corporation, and JEAN)	
M. BEAUPRE, an individual)	
)	
Defendants)	
)	

**ETHICON ENDO-SURGERY, INC.'S
BENCH MEMORANDUM REGARDING CFAA**

Pursuant to the Court's request at the June 10, 2009 jury charge conference, Plaintiff Ethicon Endo-Surgery, Inc. ("EES") respectfully submits this memorandum delineating evidence in support of its Computer Fraud and Abuse Act ("CFAA") claim. In the Court's draft jury instructions circulated on June 9, 2009, and revised June 10, 2009, it appears that the Court resolved EES's CFAA claim and preliminarily determined that insufficient evidence had been presented during the course of trial over the past week for the jury to resolve the issue. As explained further below, EES submits that sufficient evidence was presented to the jury during the course of this trial to let it decide whether Mr. Beaupre violated the CFAA.

EES's claim under the CFAA is that Mr. Beaupre exceeded authorized access in procuring EES CAD files and used them in his work at Crescendo. The CFAA has been held to apply to a situation where a former employee and his new company seek a competitive edge through wrongful use of information from the former employer's computer system. *Pacific Aerospace & Electronics, Inc. v. Taylor*, 295 F. Supp. 2d 1188, 1195 (W.D. Wash. 2003). And the CFAA covers

more than just the losses directly caused by the unauthorized accessing of a computer system. *See id.* at 1197.

Evidence in support of EES's claim was provided during the course of the jury trial by (1) Mr. Jeff Messerly, an EES engineer; (2) Mr. John Carlson, EES's Worldwide V.P. of Engineering; and (3) Mr. Jeff Christian, an expert EES retained. Excerpts of portions of relevant testimony have been reproduced in Exhibit A, and actual transcript page copies are attached as Exhibit B.

In response to the evidence by EES, Defendant Mr. Beaupre offered alternative explanations for the similarities of the CAD files and how the referenced files were created. We believe there is a factual dispute on this issue, which involves the weighing of witness credibility. EES respectfully requests that the jury be permitted to resolve EES's CFAA claim.

June 11, 2009

Respectfully Submitted,

/s/ Stephen J. Butler

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CERTIFICATE OF SERVICE

I hereby certify that on June 11, 2009, a true and correct copy of the foregoing **ETHICON ENDO-SURGERY INC.'S BENCH MEMORANDUM REGARDING CFAA** was served on counsel for Defendants as follows:

By E-mail:

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One of the Attorneys for Plaintiff
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